No. 11892

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a corporation,

Appellant.

v.

CHARLES P. BREWER, individually and doing business as Brewer's Pest Control, ROSALIE BREWER, his wife, RAYMOND RIGHTMIRE, CARL DUNCAN and EARL MERRIOTT,

Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the District Court of the United States for the District of Oregon.

FILED

AUG 9 - 1948

PAUL P. O'BRIEN,
CLERK

PLOWDEN STOTT,
Yeon Building,
Portland 4, Oregon.

COLLIER AND BERNARD,
Spalding Building,
Portland 4, Oregon.
Attorneys for Appellees.

STEVENS-NESS LAW PUB. CO., PORTLAND

SUBJECT INDEX

Page

Statement of Jurisdiction ... 1

Statement of Case ... 2

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses ... 4

The appellant did not disclose to the appellees any receipts, formulae or secret processes ... 6

An injunction should not issue against a former employee if the employer has been guilty of inequitable conduct ... 7

Points and Authorities ... 7

Argument ... 9

Conclusion ... 11

TABLE OF AUTHORITIES

Page

Briggs v. Boston, 15 Fed. Supp. 763 (Dist. Court — N. D. of Iowa, 1936) 6, 8

Byram v. Vaughn, 68 F. Supp. 981, 984 (D.C. 1946).... 9

Dutch Maid Bakeries, Inc. v. Schleicher, 58 Wyo. 374, 131 P. 2d 630 (1942) 8

Economy Grocery Stores Corporation v. McMenamy, 290 Mass. 549, 195 N. E. 746 (1935) 8

Hartford Accident & Indemnity Co. v. Jasper et al., 9 Cir. 1944, 144 F. 2d, 266, 267 5

Hydraulic Press Mfg. Co. v. Lake Erie Engineering, Corporation, 2 Cir. 1942, 132 F. 2d 403, 404 7

Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32 (1935) 8

Public Laundries, Inc. v. Taylor, 26 S. W. 2d 1085 (Tex. Civ. App. 1930) 8

Putnam v. Coates, 220 Mo. App. 218, 222, 283 S. W. 717 (1926) 7

Ridly v. Krant, 180 P. 2d 124 (Wyo. 1947) 7

Seaboard Oil Co. v. Donovan, 99 Fla. 1296, 128 So. 821, 824 (1930) 8

Smith et al v. Porter et al, 8 Cir. 1944, 143 F. 2d, 292, 295 5

Smith Baking Co. v. Behrens, 125 Neb. 718, 251 N. W. 826 (1933) 8

Super Maid Cook-Ware Corporation v. Hamil, 5 Cir. 1931, 50 F. 2d 830, 831 .... 7, 8

State v. Beaverton Portland Cement Co., 169 Or. 1, 20, 124 P. 2d 524, 126 P. 2d 1094 (1942) 7

United States v. Aluminum Co. of America et al, 2 Cir. 1945, 148 F. 2d, 416, 433 5

Wilson v. Gamble, 180 Miss. 499, 177 So. 363, 368 (1937 8

NOTE:

Reference numbers in the Brief without other designation denote pages of the Transcript of Record.

No. 11892

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Appellant.

v.

CHARLES P. BREWER, individually and doing business as Brewer's Pest Control, ROSALIE BREWER, his wife, RAYMOND RIGHTMIRE, CARL DUNCAN and EARL MERRIOTT,

Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the District Court of the United States for the District of Oregon.

STATEMENT OF JURISDICTION

The District Court had jurisdiction of this action in the nature of a civil suit in equity between citizens of different states as the amount involved, exclusive of interest and costs, exceded $3,000.00. 28 U.S.C.A. Sec. 41.

The Circuit Court of Appeals has jurisdiction of this appeal. 28 U. S. C. A. Sec. 211, 225.

STATEMENT OF CASE

In February, 1946, appellee Charles P. Brewer was employed in California by Paramount Pest Control Service, a partnership. After observing for about a week how bait was mixed and put out for rats, mice and cockroaches, Brewer went out selling by himself for a week and then went out with other men on "trouble checks" to help out and learn what he could (265-266). About two months after entering into such employment Brewer was sent to Oregon to manage the Portland territory. He was promised a salary of $250 a month and a franchise when the business reached a volume of four thousand to five thousand dollars a month—a sum deemed sufficient to make a franchise profitable to an agent (269, 272). Up to the time Brewer severed his employment with appellant the monthly business had never approximated that sum (272, 273).

In June, 1946, Brewer was told that he would have to abandon the salary arrangement and take a franchise (275, 302). The franchise that was signed gave to the company twenty per cent of the gross income.

The expenses of maintaining the business, namely, wages service, materials and expense service, wages salesmen, commissions, advertising, auto expense—gas, oil and repairs, depreciation, insurance, taxes and licenses, traveling expenses, wages office, bad debts, donations, gas, light and water, legal and accounting, miscellaneous expense, office expense—stationery, printing and supplies, telephone and telegraph, discounts and allowance received, profit and loss on sales of capital assets,

tithing, discounts and allowance paid, interest paid, "together with such other expense as in the judgment of the company should be charged against said business," were to be paid by Brewer (31-32). The company agreed to furnish Brewer such trucks as in its judgment might be necessary for him to start operations (34) and further agreed to pay the premium on a surety bond to the company (39). No automobile was ever furnished (276).

On the franchise basis of twenty per cent of the gross to the company the business was operating at a loss to Brewer (276-277). Accordingly, in November, 1946, the franchise was modified so that the net profits would be divided on a 50-50 basis as long as the franchise was in force (277-278, 306, 308). The trial court found this fact to be true (74).

On March 13, 1947, the auditor for the company told Brewer that he owed $994.25 for the months of January and February, 1947, an amount arrived at by allotting twenty per cent of the gross to the company. Brewer, thoroughly aroused, gave the auditor a check and told him that he, Brewer, was through (278-279). On Sunday morning, March 16, Brewer received at his home an air mail special delivery letter which re-cast the account so that the net profits would be divided on a fifty-fifty basis (280, Ex. 29). On receipt of the letter Brewer continued to carry on the business.

In the latter part of June, 1947, Brewer was notified that as of July 1, he would have to pay the company twenty per cent of the gross (284-285, 315). The appellant claimed this was done at Brewer's behest and

Brewer claimed otherwise. The trial court found that "the defendant Charles P. Brewer continued the business under the agreement as modified, and about the 30th day of June, 1947, the plaintiff in violation of its agreement repudiated the contract as modified and notified the defendant Charles P. Brewer that he would thereafter be required to pay the plaintiff twenty per cent (20%) of the gross business done by him (75).

On July 24 Brewer resigned his employment (284-285, 315). The company contended that this was done pursuant to a conspiracy. Brewer claimed otherwise and the trial court found as a fact that "because of the repudiation by the plaintiff of the contract as modified, the defendant Charles P. Brewer sent in his resignation as agent to be effective August 1, 1947" (75).

FINDINGS OF FACT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS, AND DUE REGARD SHALL BE GIVEN TO THE OPPORTUNITY OF THE TRIAL COURT TO JUDGE OF THE CREDIBILITY OF THE WITNESSES. (Rule 52, Federal Rules of Civil Procedure.)

ARGUMENT. Where there is a conflict in the evidence the findings of the trial court are presumptively correct and should not be disturbed unless clearly erroneous. The findings of fact are to be accepted as true, and the sufficiency of the evidence to sustain the findings remains the only consideration of the appellate court. An appellate court will not disturb findings of the trial

court based on conflicting evidence taken in open court except for clear error. Though the appellate court may be convinced that the finding could have been otherwise upon the evidence, the findings of the trial court are conclusive, as they have the same force and effect as the verdict of a jury. Hartford Accident & Indemnity Co. v. Jasper et al. 9 Cir. 1944, 144 F. 2d. 266, 267. In determining whether findings are supported by the evidence, evidence most favorable to appellees must be accepted. Smith et al v. Porter et al. 8 Cir. 1944, 143 F. 2d. 292, 295. Where a trial judge has seen the witnesses, his findings, in so far as they depend upon whether they spoke the truth must be treated as unassailable. United States v. Aluminum Co. of America et al. 2 Cir. 1945, 148 F. 2d. 416, 433.

It is admitted that in the latter part of 1946 paragraph 5 of the franchise was changed to provide for a fifty-fifty division of the net profits. The company claimed the change was for the year 1946, Brewer that it was for the full term of the contract. Brewer is corroborated by the speed with which the company retracted in March, 1947, when it attempted then to repudiate the modification. The company admitted that it intended to collect twenty per cent of the gross after July 1, 1947, and offers as an excuse that Brewer, who had been wanting the fifty-fifty arrangement, suddenly desired to go back to the original—ruinous to him—twenty per cent of the gross to the company. A question of fact was thus presented to the trial court and it found that the franchise had been modified as claimed

by Brewer, that in June, 1947, the company notified Brewer that as of July 1 it would not be bound by the contract as modified, and that because of the actions of the company Brewer resigned. These findings negative the conspiracy claimed by the appellant. If it sustained a loss it was because of its own misconduct and inequitable dealing with Brewer.

THE APPELLANT DID NOT DISCLOSE TO THE APPELLEES ANY RECEIPTS, FORMULAE OR SECRET PROCESSES.

There is substantial evidence in the case that the company never disclosed to the appellees any receipts, formulae, or secret processes (265-268, 434-435, 415) and that since going into business Brewer has used no products or formulae of the company (268-269). The trial court found against the appellant on this issue, finding "the plaintiff did not disclose to the defendant Charles P. Brewer or to any of the other defendants any receipts, formulae or secret processes and *at* the defendant Charles P. Brewer has not used in his business any receipts, formulae or processes of the plaintiff" (75).

Trade secret is plan or process, tool, mechanism, or compound known only to its owner and those of its employees to whom it is necessary to confide it in order to apply it to use it was intended. *Briggs v. Boston, 15 Fed. Supp. 763.*

AN INJUNCTION SHOULD NOT ISSUE AGAINST A FORMER EMPLOYEE IF THE EMPLOYER HAS BEEN GUILTY OF INEQUITABLE CONDUCT OR HAS HIMSELF BREACHED THE CONTRACT.

POINTS AND AUTHORITIES. 1. A petition to grant the extraordinary remedy of injunction requires great caution and deliberation on the part of the court. State v. Beaver Portland Cement Co., 169 Or. 1, 20, 124 P. 2d. 524, 126 P. 2d. 1094 (1942); Putnam v. Coats, 220 Mo. App. 218, 222, 283, S. W. 717 (1926).

2. Generally, a private employment contract which curtails the right of an employee to practice his occupation in earning his living wherever he may find work to do will not be enforced in a court of equity unless the rights of the employer reasonably need such protection. Super Maid Cook-Ware Corporation v. Hamil, 5 Cir. 1931, 50 F. 2d. 830, 831; Hydraulic Press Mfg. Co. v. Lake Erie Engineering Corporation, 2 Cir. 1942, 132 F. 2d. 403, 404.

3. The burden is on the plaintiff to show that the franchise is fair, the restrictive covenants reasonable, and that they have a real relation to, and are really necessary for the protection of the plaintiff in the business to which the covenants are incident. Super Maid Cook-Ware Corporation v. Hamil, 5 Cir. 1931, 50 F. 2d. 830, 831; Ridly v. Kraut, 180 P. 2d. 124 (Wyo. 1947).

4. Reasonableness and fairness of a contract is measured by what may be done under the terms there-

of and not what has been done. Love v. Miami Lumber Co. 118 Fla. 137, 160 So. 32, 38 (1935).

5. It must appear that plaintiff has performed all obligations imposed on it by the contract, before it is entitled to injunctive relief. Wilson v. Gamble, 180 Miss. 499, 177 So. 363, 368 (1937).

6. Injunction will be denied when it appears that plaintiff's conduct in obtaining the contract was unjust or unfair, or that plaintiff acted unjustly or unfairly under the contract, or that the contract is unjust, harsh, unfair or unreasonable, or that the entire matter appears to be inequitable. Dutch Maid Bakeries, Inc., v. Schleicher, 58 Wyo. 374, 131 P. 2d. 630 (1942); Economy Grocery Stores Corporation v. McMenamy, 290 Mass. 549, 195 N. E. 746 (1935); Super Maid Cook-Ware Corporation, 5 Cir, 1931, 50 F. 2d. 830; Briggs v. Boston, 15 F. Supp. 763 (Dist. Court—N. D. Iowa, 1936). Love v. Miami Laundry Co. 118 Fla. 137, 160 So. 32 (1935).

7. One is not entitled to an injunction against a breach of contract if he has himself already breached the contract, or has given good cause for the defendant's breach thereof. Smith Baking Co. v. Behrens, 125 Neb. 718, 251 N. W. 826 (1933); Public Laundries, Inc. v. Taylor, 26 S. W. 2d, 1085 (Tex. Civ. App. 1930); Seaboard Oil Co. v. Donovan, 99 Fla. 1296, 128 So. 821, 824 (1930).

8. If an employer prefers to leave himself free to terminate the employment at will in his own discretion

he should not be accorded an injunction to enforce a stipulation that would exclude the former employee from freely engaging in the same business. Byram v. Vaughn, 68 F. Supp. 981, 984 (D. C. 1946).

ARGUMENT. The plaintiff sold his home in Oakland, California, and moved to Portland on the promise of a salary of $250 per month and a franchise when the volume of business was sufficient to make one profitable (269, 272, 275). Apellant says Brewer was to receive $200 per month and twenty per cent of the gross income (259-260). After Brewer had moved his family to Portland and purchased a home he was told that he would have to accept a franchise or that he was through (275-302).

The contract was harsh. The company reserved the right to cancel the franchise on ninety days notice. In Byram v. Vaughn, supra, it was said:

> "Compliance with a covenant to refrain from competition with a former employer may lead to a serious hindrance and a substantial handicap in one's efforts to earn a legitimate livelihood. It may deprive the employee of the right to pursue a calling for which he is best fitted or of the opportunity to work in his chosen field of endeavor. An employer, who seeks to subject a former employee to such severe and drastic restrictions on his activities, should at least extend to him some assurance of financial security for a reasonable time. Otherwise, the employee may find himself completely at his employer's mercy. Such a result would seem inequitable and at times even contrary to the dictates of humanity. One who seeks to restrict another's freedom of action should be willing to surrender his own inde-

> pendence to a corresponding degree. If the employer prefers to leave himself free to terminate the employment at will in his own discretion, he should not be accorded the drastic and far reaching remedy by way of an injunction to enforce a stipulation that would exclude the former employee from an opportunity freely to engage in the same business. These considerations lead the court to the conclusion that unless the contract which binds one not to compete with his former employer, also obligates the employer to continue the employment for a specified term, the negative covenant should not be enforced by injunction."

The contract required Brewer to devote all his time to the business (30), to carry all the expenses of operating (31-32), to pay ten per cent of his net profit to a charitable organization (32), to purchase necessary trucks and equipment (34), to purchase all stock, merchandise, chemicals and materials from the company (34), to "do whatever shall be necessary or required by the company to increase the business of said company (34), to pay for such "advertising matter, contract forms, letterheads and any other printed matter which, in the opinion of the company is necessary in the operation of the business of the agent" (35), to pay for all fire, theft, liability and compensation policies and "such other insurance as company shall deem necessary" (37), to hire only employees satisfactory to the company and to discharge those who were not (38). All rules and regulations of the company, in existence or in futuro, became or would become part of the contract (35), and the company was made the sole and final judge as to whether Brewer was complying with the contract (40).

The inequitable conduct of the appellant in forcing this harsh contract on Brewer when he had scarcely settled himself in Portland would be grounds for a court of equity to deny relief. However, the lower court based its conclusion on findings, supported by substantial evidence, that the appellant had repudiated the contract. Under the authorities cited, this finding required the court to decline to enforce the contract to the benefit of the party who had been guilty of the wrong.

CONCLUSION. The plaintiff was never qualified to do business in the state of Oregon until August, 1947. The business was treated as belonging to Brewer. (82, 282, defendant's Exhibit 77). Neither Rightmire nor Merriott nor Mrs. Brewer was a party to the contract between appellant and Brewer. None of them were under contract obligation to appellant, and Rightmire had been told by appellant's representative that as of July 1, 1946, he (Rightmire) was working for Brewer. None of them had anything to do with Brewer's severing his connection with the appellant.

It is respectfully submitted that the decree of the lower court should be affirmed.

Respectfully submitted,

PLOWDEN STOTT,

COLLIER & BERNARD,

Attorneys for Appellees.